

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application for special leave to appeal from the Judgment dated 25.05.2010 of the Court of Appeal under and in terms of Article 128 of the Constitution and the Supreme Court Rules 1990.

Prof. Desmond Mallikarachchi,
No.118, Nivana, Kurundugahagoda,
Pilimathalawa.

Petitioner

SC Appeal No.120/2010
CA(Writ) Application No.25/2009

Vs

1. University of Peradeniya
2. Prof. H. Abeygunawardena, The Vice Chancellor,
3. Prof. A. Wickramasinghe,
4. Prof. P. W. M. B. B. Marambe,
5. Prof. K. Tudor Silva,
6. Prof. E. A. P. D. Amaratunge,
7. Prof. S. B. S. Abeyakoon,
8. Dr. W. I. Amarasinghe,
9. Prof. S. H. P. P. Karunaratne,
10. Prof. (Mrs.) P. Abeynayake,
11. Prof. K. N. O. Dharmadasa,
12. Prof. B. Hewavitharana,
13. Prof. (Mrs.) M. S. Chandrasekera,
14. Prof. A. D. P. Kalanasuriya,
15. Dr. S. D. Pathirana,
16. Dr. D. B. Wickramaratne,
17. Dr. P. Ramanujam,
18. Dr. Dushantha Madagedara,

19. Dr. Kapila Gunawardena,
20. Mr. D. Mathy Yogarajah,
21. Mr. W. L. L. Perera,
22. Mr. Mohan Samaranayake,
23. Dr. A. Kahandaliyanage,
24. Mr. Lionel Ekanayake,
25. Dr. S. B. Ekanayake,
26. Mr. L. B. Samarakoon,

1st to 26th Respondents of University of
Peradeniya, Peradeniya.

27. S. K. Liyanage, 12/1A,
Andarawatta, Polhengoda,
Colombo 5.

Respondents

AND NOW IN APPEAL BEFORE YOUR
LORDSHIPS' COURT

1. University of Peradeniya
2. Prof. H. Abeygunawardena, The
Former Vice Chancellor,
3. Prof. A. Wickramasinghe,
4. Prof. P. W. M. B. B. Marambe,
5. Prof. K. Tudar Silva,
6. Prof. E. A. P. D. Amaratunge,
7. Prof. S. B. S. Abeyakoon,
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24. Mr. Lionel Ekanayake,
25. Dr. S. B. Ekanayake,
26. Mr. L. B. Samarakoon,

1st to 26th Respondents-Petitioners of
University of Peradeniya, Peradeniya.

Respondents-Petitioners

Vs.

Prof. Desmond Mallikarachchi,
No.118, Nivana, Kurundugahagoda,
Pilimathalawa.

Petitioner-Respondent

27. S. K. Liyanage, 12/1A, Andarawatta,
Polhengoda, Colombo 5.

Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J.
H. N. J. Perera, J. &
Vijith K. Malalgoda, PC, J.

COUNSEL: J. C. Weliamuna, PC with Pulasthi Hewamanna, Thilini Vidanagamage and Khyati Wickramanayaka for the Respondent-Appellant.

K. G. Jinasena with M. H. C. Mallawarachchi and Bowala Harshani Lakmali for the Respondent-Respondent.

ARGUED ON: 21.03.2018

DECIDED ON: 25 .04. 2019

Aluwihare PC. J.,

The Respondents- Petitioners Appellants (hereinafter referred to as the “Appellants” were granted Special Leave to Appeal against the judgment of the Court of Appeal dated 25.05.2010. In the writ application, the Petitioner-Respondent (hereinafter referred to as the “Respondent”) had sought *inter alia* a writ of Certiorari to quash the decision of the Governing Council of the University of Peradeniya to demote him from the post of Professor to that of Senior Lecturer-Grade I. The Court of Appeal granted the said relief to the Respondent by issuing a writ of Certiorari. Being aggrieved by this judgment, the Appellants—the University of Peradeniya and Others—have come before this Court, stating that the Court of Appeal had failed to consider and/or appreciate the question of proportionality; had failed to distinguish between the demotion of the Respondent to the grade of Associate Professor, and the revocation/annulment of the Respondent’s promotion from the post of Senior Lecturer to Professor; had failed to give any reasons for quashing the decision to demote the Respondent to the post of Senior Lecturer-Grade I; had overstepped its lawful jurisdiction in not dismissing the Respondent’s application inasmuch as the Governing Council of the

University had acted within its scope of disciplinary powers, had ignored the submissions of the Petitioners on the relevance of the alternative statutory remedy provided for by the Universities Act; had misdirected itself on the scope of the doctrine of reasonableness/ unreasonableness; had misdirected itself on the application of proportionality to the instant case.

Special Leave to Appeal was granted on the following questions of law: Sub-paragraphs (a) and (b) of paragraph 12 of the Petition of the Appellants which are reproduced below-

- (a) Did the Court of Appeal err in granting prayer (c)- (by which the Respondent sought a writ of certiorari quashing the University's Governing Council's decision to demote the petitioner from the post of Professor to the post of Senior Lecturer- Grade I)- to the Respondent's Petition (A1) filed in the Court of Appeal, inasmuch as the Governing Council has acted within its disciplinary powers?

- (b) Has the Court of Appeal misdirected itself on the application of proportionality to the instant case?

Factual matrix

The Respondent was the Professor of Philosophy of the 1st Appellant University of Peradeniya and an ex-officio member of the Senate, the University's academic authority. He had been appointed as the part time Director of the External Examination Branch of the Faculty of Arts of the University of Peradeniya with effect from 21st of January 2000. With effect from the 16th of August 2004 he had been appointed, the Head of the Department of Philosophy and Psychology of the Faculty of Arts of the same university. Around March 2004, one R. G. Piyasiri had been appointed to investigate an internal audit query and the investigation report

submitted by R. G. Piyasiri had shown financial improprieties on the part of the Respondent. Consequently, a charge sheet dated 09th November 2004 had been issued, stating certain irregularities/ financial improprieties that had taken place in the External Examination branch under the directorship of the Respondent. The charge sheet had also stated that the Respondent had acted negligently and/or fraudulently. An Inquiry Officer had been appointed to carry out an inquiry based on the said charge sheet. While the disciplinary inquiry was in progress the Vice Chancellor had requested the Respondent to step down from the post of the Head of Department stating that as there was a disciplinary inquiry against him he cannot hold the position of Head of Department. The Respondent had not complied with this request. Regardless, a junior academic member had been appointed as the Head of Department by the Vice Chancellor for a full period of three years rather than on a temporary basis. The Respondent alleges that this appointment was contrary to the Section 51 of the Universities Act and that this appointment was made at the instigation of certain administrative officers who were unhappy with steps he had taken to prevent the misuse of the facilities of the University and the submission of fraudulent claims during his tenure as the Director of the External Examinations Department. Consequently, the Respondent had filed Writ Application No. 202/2007 dated 24th February 2007 ('P5') in the Court of Appeal to obtain a writ of certiorari to quash the letter issued appointing one Dr. M. S. M. Anes to the post of Head of the Department of Philosophy and psychology of the University of Peradeniya and to obtain a writ of mandamus to appoint the Respondent as the Head of the said department.

Meanwhile, the Respondent had also applied for the post of Professor of Philosophy on 15th September 2005 and he had been awarded the position. On 31st January of the following year, the disciplinary inquiry which commenced pursuant to the aforesaid charge sheet ('P3') had been concluded. The Respondent however, had asserted that he had not been informed of its findings. On the 5th of October 2006 the 2nd Appellant, the then Vice Chancellor of the University, had informed the

Respondent via a letter ('P10') that the Council had found him guilty of four of the eight charges against him based on the investigation report and that he is warned to refrain from committing any acts of negligence of duty in the future. The Respondent states that he had requested the Vice Chancellor (2nd Appellant) to inform him the reasons for the findings. He states that he further made an appeal/application to the University Services Appeal Board on 13th November 2006 to set aside the decision in 'P10'.

On the 15th of March 2007 another charge sheet containing another set of charges had been issued against the Respondent and he had denied all charges by his response dated 15th June 2007. While an inquiry regarding the said second set of charges was pending, he had been served with an amended statement of charges (marked 'P11'). At the inquiry the Respondent had *inter alia* raised two objections. a) That even though the 1st Appellant University had issued both the charge sheets marked 'P6' and 'P11' under the University Establishments Code it had not conducted a preliminary inquiry as required by Paragraph 8 of Chapter xxii of the same Code. Further, that approval had not been obtained from the Council under Section 45(2)(xii) of the Universities Act and that the 2nd Respondent had acted contrary to Section 34(4) of the same Act. b) That the appointment of the inquiry officer had been contrary to the provisions of the Establishment Circular No. UGC/HR/5/3/33(1) of 7th December 2004. He had also pointed out that whilst the inquiry was pending, on 29th January 2008, he had been promoted as a Professor, thereby becoming an ex-officio member of the Senate as well. The University had requested him to withdraw the Court of Appeal writ application 202/2007 as he had been promoted to the post of Professor and he had acceded to the request by withdrawing the said writ application on 20th August 2008.

On the 29th of October 2008, upon the report of the inquiring officer being tabled at the 370th meeting of the Governing Council, a sub-committee comprising of the 25th and 26th Appellants had been appointed to consider the matter. One of their

recommendations had been to demote the Respondent from the post of Professor to that of Senior Lecturer-Grade I. Based on that recommendation the Council at its 371st Meeting on 1st of November 2008 had decided to demote the Respondent to the grade of Associate Professor (per excerpts marked 'P19' and 'P20'). The Respondent had taken up the position that he had received reliable information that thereafter, at the 372nd Meeting of the Council held on 13th December 2008, the Council had, at the instigation of the 26th Appellant, decided to demote him to the post of Senior Lecturer-Grade I. The Respondent states that the 26th Appellant was not on good terms with him since he had, while he was the Director of External Examinations Department, rejected a claim made by the 26th Appellant pretending to be a consultant appointed by the UGC. He states that he had further learnt through reliable means that the 26th Appellant had volunteered to be a member of the Sub Committee which was appointed to examine the inquiry report submitted by the 27th Appellant.

On 14th January 2009 the Respondent by the Writ Application CA/Writ/25/2009 (marked 'A1') had sought a Writ of Certiorari quashing both the decision of the Governing Council to demote him to the post of Associate Professor and, the subsequent decision of the same Council to demote him to the post of Senior Lecturer-Grade I. The Respondent also sought an interim order (by paragraph (e') of the prayer to the writ application) preventing the 1st and 2nd Appellants to the present Application (1st and 2nd Respondents Petitioners to the initial Writ Application) from issuing the letter, demoting him from the post of Professor to Senior Lecturer-Grade I, until the final determination of the same writ application. The interim relief had not been granted but the Court of Appeal had issued notice on the Respondents on 17th February 2009.

In the Statement of Objections in respect of the said writ application filed by the Appellants dated 17 August 2009 (marked 'A2'), they had taken up the position that an audit query into the affairs of the External Examinations Branch had been

conducted with the assistance of the Auditor General's Department and based on the subsequent audit report of 26th June 2003 (marked 'R2') the Council had appointed R. G. Piyasiri to investigate and report. The investigation report (marked 'P7') submitted by R. G. Piyasiri had been the basis for the Council at its 349th meeting to decide to hold an inquiry against the Respondent. They have further stated that the charge sheet marked 'P3' had been issued with the Council's approval and that the charge sheets marked 'P6' and 'P11' had been issued after the findings of the audit report marked 'R2' had been approved by the Council (excerpts from the minutes of the 361st and 363rd meetings of the Council 'R4' and 'R5'). The Appellants had also stated that the inquiring officers had been appointed under the relevant provisions of the University Establishment Code with the approval of the Council and that the Council has the right to arrive at suitable decisions regarding the Respondent, based on the findings of the disciplinary inquiries. The Appellants had pointed out that issuing a letter of warning is not considered a disciplinary action as set out in paragraph 4:4 of Chapter XXII of the UGC Establishment Code. The Council had become aware that, as per the Government Establishment Code, promotions cannot be given to officers against whom formal charge sheets have been issued and that for that reason, the decision to promote the Petitioner had been annulled, as evidenced by the minutes of the 372nd Council meeting (marked 'R10').

In his Counter objections (marked 'A3') the Respondent had stated that no decision per 'R4' and 'R5' had been taken to issue the charge sheet ('P6' and 'P11') and therefore no decision had been taken in terms of the UGC Establishment Code by the Governing Council to conduct a disciplinary inquiry against the Petitioner. The Respondent had also stated that the decision taken by the previous Council to promote him to the post of Professor cannot be annulled on the recommendation made by a sub-committee of the Senate and that the Petitioners had violated the fundamental principles of Natural Justice by not issuing a 'show cause' letter to the Respondent. He had averred that the applicable circular was the Public

Administration Circular 59/91 dated 13th December 1991 (marked 'P23') read with UGC Communication Circular No. 69 (marked 'P22') and Establishments Circular Letter No. 3/1992 (marked 'P24') and therefore the University had deviated from the procedure of disciplinary actions approved by the UGC.

At the hearing of the case before the Court of Appeal, the Respondent had averred that both the charge sheets (marked 'P3' and 'P6', 'P11') were contrary to the Universities Act, the same having been issued without obtaining approval from the Governing Council. The Respondent had further averred that the 1st Petitioner University had failed to act in terms of the Government Establishments Code which the University Grants Commission (UGC) had adopted by Public / Administration Circular No. 59/91 dated 13th December 1991 (marked 'P 26') which provides that "all public officers are required to comply with the provisions stipulated in Part I and Part II of the Establishment/ Code." Therefore, the Respondent had argued that the two charge sheets were illegal, had no force in law and the inquiry conducted and its report were bad in law and not binding on the Petitioner. He had stated that the decisions to demote him are illegal, unreasonable and are in contravention of the Universities Act and the disciplinary rules adopted by the UGC and the principles relating to demotions.

The Appellants in turn had submitted that all steps were taken with the approval of the disciplinary authority, i.e. the Governing Council, and that no illegality, irrationality or procedural impropriety had taken place and that the Petitioner has an alternative remedy provided by the Universities Act in as much as he was entitled to appeal to the University Services Appeal Board. The Court of Appeal had delivered its judgment issuing a Writ of Certiorari quashing the decision to demote the Respondent to the position of Senior Lecturer Grade I but had not granted the other relief sought by the Respondent, namely the quashing of the Council's decision to demote the Respondent to the Post of Associate Professor, the quashing

of the Council's decision to impose an additional punishment to charge Rs. 53, 250.00 from the Respondent.

The decision of the Governing Council of the Appellant University

The first disciplinary inquiry on the charge sheet 'P3' should not be a concern for this court since following the consideration of the inquiry report the Council had decided that issuing a letter of warning to the Respondent was a sufficient measure and no other disciplinary action had been taken.

Then it has to be considered whether the Council was correct in changing their original decision to demote the Respondent to the post of Associate Professor. The excerpt from the Minutes of the 372nd Meeting of the Council held on 13th December 2008 (marked 'R10') reveals the basis for the Council's decision to annul the promotion of the Respondent to the position of Professor. It had been noted by the Vice Chancellor that as confirmed by the letter No. UGC/HR/6/3/16 dated 24th November 2008 the provisions of the Government Establishments Code are applicable to matters for which specific provisions have not been made in the Establishments Code of the UGC and Higher Educational Institutions/Institutes. Accordingly, Paragraph 14:12 of Chapter XLVIII of the Government Establishments Code becomes applicable. The said provision stipulates that "when a formal charge sheet has been issued against an officer for disciplinary action, granting him/her salary increments, promotions, foreign trips and scholarships, study leave with pay, loans and advances, no pay leave locally and abroad and secondment should forthwith be suspended until the final outcome of the inquiry" This means that the Council could not have granted the promotion to the Respondent in the first place. Accordingly, the decision of the Council to annul the promotion of the Respondent to the Post of Professor is not *prima facie* illegal.

However, the Appellants have not placed the said letter No. UGC/HR/6/3/16 dated 24th November 2008 before this Court. Instead Commission Circular No. 911 dated 14th May 2009 (marked 'P34') is produced. According to 'P34' the

decision that the Government Establishments Code should apply in all cases where the UGC Establishments Code makes no provisions, has been made on 19th February 2009 at the UGC'S 774th meeting. In that case, when the Respondent was promoted on the 1st of February 2008 there was no such existing decision. The Circular cannot be applied to the Respondent's promotion retrospectively. Since the Appellants have failed to produce a document that bears evidence that the decision to apply the Government Establishments Code to situations of *casus omissus* was taken before the decision to promote the Respondent to Professorship, their contention cannot stand. The Council has erroneously applied the circular in that they applied it retrospectively.

To substantiate his contention that the University was in deviation from the procedure of disciplinary actions approved by the UGC the Respondent refers to the documents marked 'R4', 'R5', 'P22', 'P23' and 'P24'. Out of them, 'R4' and 'R5' are extracts from the Minutes of the 361st Council Meeting held on 10th November 2007 and 363rd Council Meeting held on 17th August 2009 respectively. 'R4' states *inter alia* that after considering the draft charge sheet the Council decided to give authority to the Vice-Chancellor to issue the same after effecting necessary amendments. Section 147 of the Universities Act defines a 'Teacher' as "a Professor, Associate Professor, Senior Lecturer, Lecturer and Assistant Lecturer, and the holder of any post declared by the Ordinance to be a post, the holder of which is a teacher." Section 45(2)(xii) of the Universities Act states that the Council shall appoint persons to, suspend, dismiss or otherwise punish persons in the employment of, the University, subject to the proviso that "except in the case of Officers and teachers, these powers may be delegated to the Vice Chancellor." Accordingly, the Respondent has correctly averred that he falls into the category of 'Teacher' and therefore his disciplinary authority, the Council of the University of Peradeniya, cannot delegate its powers regarding him, to the Vice Chancellor. However, 'R4' and 'R5' records that the charge sheet 'P6' and the amended charge sheet 'P11' had been perused by the Council at the 361st and 363rd Council

Meetings respectively and the Vice Chancellor had been given the authority to issue 'P6' and the Registrar had been given instructions to issue 'P11' to the Respondent. Therefore, the Respondent's contention that as the Vice Chancellor served the charge sheet on him while it is the Council that can issue a charge sheet to him cannot hold ground. The Vice Chancellor was merely the means through which the decision was communicated to him. The decision per se was taken by the Council itself.

The Public Administration Circular 59/91 (marked 'P23') which made any violation of any provisions of the Establishments Code and instructions in any Public Administration Circular by any Public Officer a punishable offence under Schedule A of Part II of the Establishments Code has been adopted by the UGC by Establishments Circular Letter No. 3/1992 (marked 'P24'). The UGC was empowered to do so by UGC Communication Circular No. 69 of 3rd April 1980 (marked 'P22') which stated that the UGC and Higher Educational Institutions are Public Corporations and that regarding Circulars and Circular Letters containing decisions and instructions which deal with the management of internal affairs of the UGC and the Higher Educational Institutions, the provisions of the Universities Act No. 16 of 1978 would supersede those instructions. Where such instructions are not inconsistent with the provisions of the Universities Act No. 16 of 1978 it is open to the UGC and the Higher Educational Institutions to adopt and to act upon any such instructions.

The charge sheets marked 'P3' and 'P6', 'P11' have been issued under Paragraphs 2:2:4 and 4:1:2 of Chapter XXII of the University Establishments Code. The Respondent has drawn the attention of court to the documents marked 'P22' – 'P24' to demonstrate that the said University Establishments Code had not been approved by the UGC at the time the charge sheets were issued. In addition, it has been pointed out that in its Statement of Objections dated February 2006 (marked 'P26') in the application no. CA 585/2005 the University of Peradeniya itself has taken

up the position that the UGC Establishments Code per its foreword “is only a guide to the regulation of the administration of Higher Education Institutions”. The Respondent argues that according to the decision made by UGC Communication Circular No. 69 of 3rd April 1980 (marked ‘P22’) the provisions of the Establishments Code are applicable to the Respondent and that the Appellants had however framed the charges under the provisions of the UGC Establishments Code which had not been in operation officially until the issuing of the UGC Circular No. 911 dated 11th May 2009. The Respondent therefore argues that the failure to frame charges in terms of the provisions of the Government Establishments Code renders the charge sheet a nullity.

The Appellants state that the Respondent’s above submission- that the charge sheet itself is a nullity on the basis that it was not issued under the Government Establishments Code- cannot be relied on by the Respondent due to the fact that the Respondent had participated at the inquiry held under the UGC Establishments Code. The Respondent had however objected to the inquiry on the grounds of improper procedure and inapplicability of the UGC Establishment Code as recorded in page 1 of the Formal Inquiry Report marked ‘P27’. He had also stated that he is appearing at the inquiry on the expectation of challenging this inquiry before a court of law (vide page 5 of ‘P27’).

Furthermore, the Appellants point to the Minutes of the 371st Meeting of the Council confirmed on 13th December 2008 (marked ‘R10’) where it was stated that the Council decided to promote the Respondent on the basis that a person is innocent until he or she is proven guilty by an appropriate administrative/legal mechanism. The assumption had been that there was no specific provision applicable regarding promotions pending disciplinary action. The minutes state that a decision had been taken by the Council to approve the promotion subject to initiation of appropriate action if he was found guilty in the case pending. Countering this position, the Respondent points out that no such condition was

mentioned in the letter of promotion nor in the agreement between the petitioner and the University. In the absence of any proof that it was in fact conveyed to the Respondent that his promotion was approved subject to the condition that appropriate action would be taken if he was subsequently found guilty in the pending case, the Respondent's version has to be accepted.

Preliminary Inquiry

The purpose of a preliminary inquiry under the Government Establishments Code as set out in Paragraph 13:1, Chapter XLVIII is "to find facts as are necessary to ascertain the truth of a suspicion or information that an act of misconduct has been committed by an officer or several officers, and to find out and report whether there are, prima facie, sufficient material and evidence to prefer charges and take disciplinary action against the officer or officers under suspicion." It is further stated that "The primary task of an officer or a Committee of Officers conducting a preliminary investigation is the recording of statements of relevant persons, examination of documents and records, obtaining of originals or certified copies thereof...and making their observations and recommendations on matters found out by them regarding the act of misconduct committed." As per Chapter 13:12 of Chapter XLVIII the officer conducting the preliminary investigation is expected to prepare a draft charge sheet as per Appendix 5 of the Government Establishments Code.

The Appellants reject the Respondent's contention that no preliminary inquiry was held, by force of the report විධිමත් විනය පරීක්ෂණය (marked 'R6') tendered by Inquiring Officer one S. K. Liyanage, which includes an inquiry report, a summary of the evidence given, notes of the inquiry and the documents tendered by the two parties. This report goes over and above the scope of the purpose for which a preliminary report is drawn. It presents an analysis of each of the seven charges against the Respondent and gives a verdict that the Respondent is guilty of all the charges except Charges 5 and 6. The conclusion that the report is more than a

preliminary report is further consolidated by the fact that the Council at its 370th Meeting on 11th November 2008 appointed a Sub-Committee to study the report and give their recommendations, which Sub-Committee later recommended that the Respondent be demoted to the post of Senior Lecturer-Grade I.

The document dated 04. 06. 2004 and marked 'P7' is an inquiry conducted by R. G. Piyasiri which can be considered a Preliminary Inquiry given that 'P7' gives information on the errors and irregularities that were identified based entirely on an examination of the documentation on payments regarding the series of seminars held for the undergraduates on April 20, 21, 27, 28, May 11, 12 and June 1 and 2. Further a recommendation had been made that disciplinary action should be taken against the Respondent and several other members of the staff for committing the errors and irregularities identified in 'P7'. The Statement of objections of the Appellants in the present case in the writ application before the Court of Appeal at Paragraph 13 state that based on the Audit Query the Council had appointed R. G. Piyasiri to carry out an investigation and report to the Council. The Council had then decided to hold an inquiry against the Respondent based on the charges recommended by R. G. Piyasiri. In addition, the inquiry had not been conducted by S. K. Liyanage who conducted the Formal Inquiry.

Doctrine of Proportionality

The excerpt from the Minutes of the 370th Council Meeting held on 27th September 2008 (marked 'R7') indicate that the Vice Chancellor was of the opinion that as the Director of External Examinations the Respondent "should not alone shoulder the responsibility for these acts, as there were responsible officers down in the line to assist and advise him in carrying out duties of this nature." The Recommendation of the Sub Committee appointed by the University Council (marked 'R8') includes a finding by the Committee members that "although the charge sheet indicates the charges as 'grave offences' we find that these were more

due to negligence and incompetence on the side of Dr. D. Mallikarachchi” and “that this anomaly could have been avoided if the Senior Administrative Officers and Senior Finance Officers ... had advised Prof. D. Mallikarachchi regarding the consequences of payments without following proper procedures.” Notwithstanding these observations, the recommendation for the reversion of the position of Prof. D. Mallikarachchi to the next lower post of Senior Lecturer-Grade I was made based on considerations of “his position, maturity, level of responsibility and all the circumstances surrounding the commission of offences.”

The punishment recommended by the Sub Committee was the demotion of the Respondent to the level of Senior Lecturer-Grade I. The annulment was carried out because it later came to the knowledge of the Council that the UGC Establishments Code rather than the Government Establishments Code had been relied on erroneously and that if not for that error, the promotion could not have been awarded in the first place. In addition, an order barring the Respondent from applying for a promotion again within the span of the next 2 years from the date of the Council meeting i.e. 13th December 2008 was also made.

However, the letter dated 11th May 2009 titled ‘Promotion to the Grade of Professor-The Council Decision on the Disciplinary Inquiry’ sent by the Vice Chancellor to the Respondent states that the Council unanimously decided to debar the Respondent from applying for the next promotion for two years with effect from the date of the previous application for post of Professor i.e. 26th September 2005.

Whereas the recommendation to demote him to the Senior Lecturer grade would have been disproportionate given the grounds the Sub- Committee itself has mentioned in their recommendation ‘R8’, demotion to Associate Professor is the punishment meted out and proportionate.

A 2-year bar from the date of the Council meeting would have been disproportionate given that the Respondent was 64 years of age at the time of the

Council decision meaning that a 2-year bar would effectively prevent the Respondent from applying for the post of Professor before his retirement.

This would not have been the least intrusive manner, especially in the context that the Respondent had already been awarded the Professorship having obtained high marks, he had held the post from 1st February 2008 onwards, had agreed to withdraw the Writ application he had filed challenging his removal from the post of Head of Department given that he was awarded the Professorship. However, it appears that the final punishment that was meted out to the Respondent was changed for the bar to run from 2 years from the initial application for the post of Professor.

Wade and Forsyth in 'Administrative Law' explains that in challenging the proportionality of a decision one aspect that has to be considered is the 'necessity question' or whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. "...the 'necessity question' is interpreted as requiring only 'whether a less intrusive measure could have been used without unacceptably compromising the achievement of objective' rather than 'no more than is necessary to accomplish the objective'." (vide page 307 and 308, 11th Edition).

The Court of Appeal has held that the Respondent's position about the non-holding of an inquiry is not strictly correct and that disciplinary action could be taken against the Respondent, but it has also held that "the punishment should not be too harsh or excessive to make it disproportionate." Given that the University Council was fully aware of the Respondent's capabilities and entitlement to be appointed as Professor, the decision to deprive him of the Professorship was considered by the Court of Appeal to be excessive and too harsh. For the reasons I

have set out earlier in the judgement I see no need to interfere with the above decision of the Court of Appeal and further reiterate its position that “punishment should in all cases be commensurate with the seriousness of the offence committed.”

As such I answer both questions of law on which Leave to Proceed was granted in the negative and being mindful of the just and equitable jurisdiction this court is endowed with, hold that the quashing of the decision to annul the Respondent’s promotion to Professorship by the Court of Appeal should not be overturned.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J. PERERA

I agree

CHIEF JUSTICE

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT